

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 10- _____

STATE OF MONTANA,

Petitioner,

v.

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY, THE HONORABLE
MIKE SALVAGNI, DISTRICT JUDGE,Respondent.

**ATTORNEY GENERAL'S PETITION FOR
A WRIT OF SUPERVISORY CONTROL**

The State of Montana respectfully requests this Court issue a writ of supervisory control, in State v. Shanara Anderson (Anderson), Cause No. DC-09-33AX, for the deliberate homicide of Anderson's 3-month old daughter, V.A.C., directing the district court to partially vacate its order excluding evidence, based on erroneous interpretation of the transaction rule.

STATEMENT OF THE FACTS**The Crime**

The State charged Anderson with deliberate homicide for purposely or knowingly causing the death of her 3-month old daughter, V.A.C., by suffocating her on January 10, 2008, in Bozeman. (D.C. Docs. 1, 3, attached as Exs. A & B.)

The circumstances of V.A.C.'s death are generally described in this Court's opinion in In re E.A.C., 2009 MT 151N, a parental rights termination proceeding involving V.A.C.'s older sibling.

As the State argued in E.A.C., according to the testimony of Dr. Walter Kemp, the infant victim died of suffocation or smothering. (Autopsy Report, attached as Ex. C.) The suffocation or smothering was preceded by some traumatic event near V.A.C.'s death, as evidenced by brain swelling. V.A.C. also sustained a rib fracture near the time of death. This rib fracture was one of thirteen rib fractures V.A.C. suffered. The fractures were in various stages of healing. Although V.A.C.'s multiple rib fractures were not the cause of her death, the victim did not die from natural causes. The brain swelling was inconsistent with Sudden Infant Death Syndrome (SIDS). (Ex. C.)

The State contends that V.A.C.'s death was a child abuse homicide committed by the victim's mother, Anderson. The State contends that only Anderson could have caused the child's injuries and death and that she did so deliberately. V.A.C. was alive and uninjured when Anderson's fiancé left for work. In a 911 call, Anderson suggested that her two-year-old daughter, E.A.C., may have caused the child's death by covering V.A.C. with a coat. The victim's demise, however, was preceded by a traumatic event causing brain swelling and a rib fracture. A two-year-old girl could not have caused those injuries.

Procedure

The State timely filed a Just Notice. (D.C. Doc. 46, attached as Ex. D.) The State did not concede that any of the evidence was subject to the Modified Just Rule, but wished “to avoid any claim of surprise on the part of the defendant” (Ex. D at 5) and filed the notice “out of an abundance of caution.” (3/11/10 Tr. at 135, attached as Ex. E.) Anderson objected. (D.C. Docs. 120, 121.) The State filed a response and an Amended Just Notice. (D.C. Docs. 166, 167.) Anderson replied and moved to strike the Amended Just Notice, which motion the parties briefed. (D.C. Docs. 176, 177, 184, 187, 214.) The State filed both notices well in advance of trial and the defense conceded there was no surprise. (Ex. E at 133.)

Following a hearing, the district court entered its order. (D.C. Doc. 230, attached as Ex. F.) The court granted Anderson’s motion to strike the Amended Just Notice, ruling that the initial notice was technically inadequate, and the amended notice was untimely and without good cause to forgive its untimeliness. (Ex. F at 24.) The district court then analyzed the particular evidence set forth in the notices, concluding: “If the evidence is subject to the Modified Just Rule, it will not be allowed. If the evidence is ‘transactional evidence,’ it will be allowed.” (Ex. F at 14.) Following Anderson’s transaction rule analysis nearly verbatim (D.C. Doc. 176 at 2-6, attached as Ex. G), the district court concluded: “The only evidence identified in the State’s Just Notice that is admissible, subject to the

proper foundation, is the evidence by Dr. Kemp of a single rib fracture close in time to [V.A.C.'s] death.” (Ex. F at 15-19, 24.)

Evidence at Issue

At the hearing, the State conceded that Anderson’s abusive behavior toward her other daughter, 2-year old E.A.C, was properly 404(b), and not “transactional,” evidence. (Ex. E. at 163-64, 168-70, 172-76.) This petition does not challenge the district court’s ruling in that regard. (See Ex. D at ¶¶ 1, 2, 3, 4, part of 5, part of 6, 7.) Additionally, the State does not challenge the district court’s ruling excluding the evidence of a Dawson County “welfare check.” (See ¶ 8, Ex. D at 4.)

The district court erroneously excluded the following categories of evidence:

V.A.C.’s physical injuries and autopsy (Ex. D at ¶ 11); Anderson’s relationships with V.A.C. and V.A.C.’s father (Ex. D at ¶¶ 5, 6, 9, 10); and specific instances of Anderson’s abusive words and conduct directed toward V.A.C. (Ex. D at ¶¶ 5, 6.)

ISSUES

1. Is supervisory control appropriate where the normal appeal process is inadequate to review an erroneous interpretation of the transaction rule?
2. Did the district court proceed under mistake of law by excluding transaction evidence?
3. Will the exclusion of admissible evidence cause a gross injustice?

ARGUMENT

Supervisory control is an extraordinary remedy, justified when urgency or emergency factors exist, making the normal appeal process inadequate; when the case involves purely legal questions; and, as pertinent in this case, the other court is proceeding under a mistake of law and causing a gross injustice. Mont. R. App. P. 14(3)(a); State v. 13th Judicial District Court, 2009 MT 163, ¶ 13, 350 Mont. 465, 208 P.3d 408.

I. SUPERVISORY CONTROL IS APPROPRIATE.

The exclusion of evidence under the transaction rule, Mont. Code Ann. § 26-1-103, is not an order or judgment from which the State may take an appeal. Mont. Code Ann. § 46-20-103; State v. Strizich, 286 Mont. 1, 11, 952 P.2d 1365 (1997). If the district court erroneously excludes evidence under a statute, the State has no adequate remedy on appeal. State v. 14th Judicial Dist. Court, 277 Mont. 349, 353, 922 P.2d 474, 477 (1996); State v. 21st Judicial District Court, 2001 MT 305, ¶ 10, 307 Mont. 491, 38 P.3d 820.

The exclusion of transaction evidence is a “pure legal question” that is appropriate for decision by this Court through supervisory control. Where the rationale for excluding evidence is based on a conclusion of law, the Court reviews the conclusion of law de novo, without deference to the district court. State v. Guill, 2010 MT 69, ¶ 21, 355 Mont. 490, 228 P.3d 1152. Here, the district court

excluded evidence based on its erroneous conclusions of law interpreting Mont. Code Ann. § 26-1-103. The assumption of original jurisdiction for the purpose of exercising supervisory control is appropriate for cases involving “purely legal questions of statutory . . . construction,” State v. 9th Judicial District Court, 262 Mont. 70, 72, 863 P.2d 1027 (1993) (citation omitted), including the erroneous exclusion of evidence under a statute. 14th Judicial District Court, 277 Mont. at 353 (evidentiary rulings under the Rape Shield Law).

II. THE DISTRICT COURT PROCEEDED UNDER MISTAKE OF LAW.

A. The District Court’s Erroneous Interpretation of the Transaction Rule

Montana Code Annotated § 26-1-103 provides: “Where the declaration, act, or omission forms part of a transaction which is itself the fact in dispute or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction.” Pursuant to the rule, prior acts that are inextricably linked to, and explanatory of, the charged offense are admissible notwithstanding the rules relating to “other crimes” evidence. State v. McLaughlin, 2009 MT 211, ¶ 14, 351 Mont. 282, 210 P.3d 694.

In State v. Guill this Court confirmed its continued employment of the phrase “inextricably linked” to describe acts that are part of a transaction under Mont. Code Ann. § 26-1-103. Guill, ¶ 27. The rationale for admitting transaction

evidence is twofold: it is theoretically difficult to subdivide a course of conduct into discrete criminal acts and “other” conduct; and, practically speaking, it is difficult for witnesses to testify coherently to events if they are only permitted to reference the minutely defined elements of the crime. Guill, ¶ 27. All federal circuits, and numerous commentators, recognize the legitimacy of admitting properly limited evidence that is “intrinsic to” or “inextricably intertwined with” a charged crime. Guill, ¶ 28.

V.A.C.’s nonaccidental, unnatural death, while in the sole care of her mother, comprises the transaction of facts in dispute. The baby’s injuries, Anderson’s relationship with V.A.C., and Anderson’s words and actions in relation to V.A.C., all inform the jury’s consideration of what happened to V.A.C. The story of V.A.C.’s short life is the story of her death--it is all inextricably linked and explanatory of the charged homicide; it is all necessary to provide the jury with the context of V.A.C.’s death, and it is not evidence of the mother’s character or propensity. Evidence of “misconduct which is inseparably related to the alleged criminal act” is transactional and not character. State v. Gaither, 2009 MT 391, ¶ 41, 353 Mont. 344, 220 P.3d 640 (citing State v. Crosley, 2009 MT 126, ¶ 48, 350 Mont. 223, 206 P.3d 932.) Evidence of the relationships, the nonaccidental injuries, and the specific instances of abusive conduct, are specifically and inextricably linked to, and uniquely explanatory of, V.A.C.’s nonaccidental death.

Intending no disrespect to the district court, the district court's adopted character/propensity analysis does not fit the unique circumstances of a child abuse homicide. (Compare Ex. F at 16-18 and Ex. G at 2-4.) See State v. Wendler, 2008 MT 370, ¶ 24, 346 Mont. 467, 197 P.3d 932 (discouraging wholesale adoption of a prevailing party's conclusions of law). Generally, in admitting evidence of the "battered child syndrome," other courts have rejected the notion that evidence of prior injuries is only admissible if there is a nexus between the prior injuries and the defendant--which nexus clearly exists in this case anyway. See State v. Martinez, 68 P.3d 606, 615-16, (Haw. 2003); State v. Moyer, 727 P.2d 31, 33 (Ariz. Ct. App. 1987); State v. Holland, 346 N.W. 2d 302, 308 (S.D. 1984). Such evidence is not accusatory on the part of a particular defendant, but merely describes the nature of the victim's injuries. State v. Tanner, 675 P.2d 539, 543 (Utah 1983).

The district court equated the proposed evidence with "textbook use of character evidence." (Compare Ex. F at 18 and Ex. G at 4.) This analysis fails to take into account the "longstanding distinction" between 404(b) evidence of "other" crimes and evidence of a "defendant's misconduct which is inseparably related to the alleged criminal act." Gaither, ¶ 41. Such "other" crime evidence is entirely separate from, even mutually exclusive of, transaction evidence, Guill,

¶ 53 (Nelson, J., concurring), which is evidence of “this” crime--here, the nonaccidental death of V.A.C.

In State v. Lacey, 2010 MT 6, ¶¶ 9, 32-33, 355 Mont. 31, 224 P.3d 1247, evidence of sexual advances against persons other than the victim should not have been admitted under the transaction rule. In opposite to Lacey, V.A.C.’s injuries and abuse tend to prove the operative facts at issue and go to facts and encounters that are not “completely separate from” the crime for which Anderson was charged. Lacey, ¶ 32. At the hearing, the State responded to the district court’s questions about Anderson’s acts against V.A.C. vis a vis Lacey: “Sure it’s a prior act. But just because an act comes before an offense doesn’t mean it’s not part of the transaction.” (Ex. E at 167.)

The district court also erroneously concluded that “homicide is different” for the purposes of the transaction rule because it is a “one-time offense” and there was no special “explanatory” need to be served by discussing prior abuse. (Compare Ex. F at 17 and Ex. G at 4.) The district court’s “one-time offense” conclusion is not borne out by this Court’s transaction precedent, specifically Mackrill, which concluded prior disorderly and obstreperous conduct--not directed toward the victim--was related to the later aggravated assault (another “one-time offense”) and explanatory of the circumstances surrounding that offense. Mackrill, ¶ 42; see also, Schleret v. State, 311 N.W.2d 843, 844 (Minn. 1981) (in child abuse

cases the succession of harm done to the child may extend over several months or more).

The district court's conclusions did not recognize the unique nature of a child abuse homicide involving an unnatural and nonaccidental death, preceded by clear evidence of nonaccidental injuries and specific instances of abuse of the victim by her own mother. See, e.g., Tanner, 675 P.2d at 546 (in cases of child abuse, evidence of specific instances of defendant's treatment of the child is relevant to establish a "specific pattern of behavior by the defendant toward one particular child, the victim.") Contrary to the district court's ruling, the evidence of injuries, relationships, and abuse is uniquely and "specifically linked to the nature and type of crime allegedly committed." Gaither, ¶ 45. A battered child's death is by nature and definition not a "one-time" offense.

B. The District Court Mistakenly Excluded Evidence of V.A.C.'s Injuries, Anderson's Relationships, and Specific Instances of Abuse.

Evidence of V.A.C.'s physical condition at the time of her death addresses the jury's right to hear what happened before the commission of this homicide and provides context to the circumstances of the homicide. See State v. Berosik, 2009 MT 260, ¶ 45, 352 Mont. 16, 214 P.3d 776. V.A.C. suffered multiple nonaccidental injuries throughout her short life. The jury is entitled to hear about those injuries, and the experts' conclusions and opinions about them. Even

Anderson conceded that the medical evidence was proper for jury consideration. (Ex. E at 159-60.)

Anderson argued the jury didn't need the evidence of abuse, because "You've got the medical evidence." (Ex. E at 160.) Anderson knew the evidence was admissible and anticipated calling her own expert. (Id. at 159-60.) Indeed, battered child syndrome is a medical diagnosis that has been deemed admissible by courts across the country for over 30 years. See, e.g., State v. Taylor, 163 Mont. 106, 120, 515 P.2d 695, 703 (1973); Tanner, 675 P.2d at 541-50 (citing People v. Jackson, 18 Cal. App. 3d 504 (1971); State v. Faufata, 66 P.3d 785 (Haw. App. 2003); People v. De Jesus, 389 N.E.2d 260 (Ill. App. 1979); Bludsworth v. State, 646 P.2d 558 (Nev. 1982); State v. Goblirsch, 246 N.W. 2d 12 (Minn. 1976); State v. Wilkerson, 247 S.E.2d 905 (N.C. 1978); Ashford v. State, 603 P.2d 1162 (Okla. Crim. 1979); State v. Mulder, 629 P.2d 462, 463 (Wash. App. 1981)). The United States Supreme Court has affirmed states' use, and the admissibility, of battered child syndrome evidence. Estelle v. McGuire, 502 U.S. 62, 68-69 (1991) (battered child syndrome helps to prove child died at the hands of another and not by accident, and that the "other" inflicted the injuries).

The only story 3-month old V.A.C. can ever tell "is the mute testimony of the body" showing a series of nonaccidental injuries while under the care of her mother. Tanner, 675 P.2d at 541. The jury is entitled to hear what V.A.C.'s body

has to tell--that her death was not an accident and that it culminated a life of abuse. V.A.C.'s injuries are not evidence of anybody's "character," they are the end product of someone's specific acts of abuse. If it is "transactional" at all, the medical evidence defines and establishes the essential element of the crime that V.A.C. died and explains the circumstances of her death.

The relationship evidence is likewise inextricably linked with and explanatory of how V.A.C. lived and died. Evidence of the family situation, whether the father was around, who cared for the child, and how the mother felt about having a girl all provides context for the jury to understand what happened, who had an opportunity to harm V.A.C., and who had a motive or animus toward her. As evident from the facts of Guill, family relationships and interactions prove context, not character. Guill, ¶¶ 8-16, 47. Furthermore, such evidence can be limited to its proper purpose by a cautionary instruction.

The district court also mistakenly excluded evidence of Anderson's abusive conduct toward V.A.C. Evidence of brutal abuse and excessive discipline of a young child, leading to its death, is admissible upon "independent grounds" other than Just. State v. Murray, 228 Mont. 125, 134, 741 P.2d 759, 765 (1987) (citing State v. Sigler, 210 Mont. 248, 688 P.2d 749 (1984)). Such evidence has been admitted as habit under Mont. R. Evid. 406, and the Court has disagreed with its

characterization as inadmissible character evidence. State v. Huerta, 285 Mont. 245, 255-56, 947 P.2d 483,489-90 (1997) (citing Sigler, 210 Mont. 248).

Evidence admitted on grounds “independent” from 404(b)/Just in this line of cases--though expressly admitted as “habit”--is entirely consistent with admissibility under the transaction rule and is similar to the evidence at issue here. V.A.C.’s injuries and abuse suffered prior to her nonaccidental death is “specifically linked” to the circumstances surrounding her death. See Huerta, 285 Mont. at 255 (detailing the prior “brutal, heedless, and unfeeling” treatment of murdered infant in Sigler); Sigler, 210 Mont. at 251-53.

Contrary to the district court’s adopted reasoning, child physical abuse cases, especially where the victims are non-verbal, are unique for the purposes of the transaction rule and admission of prior abuse of those victims. In 1981, the Minnesota Supreme Court recognized:

Much of the evidence that can be gathered to show an instance of “battered child syndrome” is circumstantial. In allowing such evidence to support a conviction, this court has recognized those felonious assaults are in a unique category. Most cases of felonious assault tend to occur in a single episode to which there are sometimes witnesses. By contrast, cases that involve “battered child syndrome” occur in two or more episodes to which there are seldom any witnesses. In addition, they usually involve harm done by those who have a duty to protect the child. The harm often occurs when the child is in the exclusive control of a parent. Usually the child is too young or too intimidated to testify as to what happened and is easily manipulated on cross-examination. That the child in the instant case did not survive, strengthens, rather than diminishes the law’s concern

for the special problems of prosecuting a defendant in a “battered child” case. As background, direct testimony of earlier episodes of harm done to a child is admissible.

Schleret, 311 N.W.2d at 844-45.

The type of evidence admitted independent of 404(b) in Sigler, Murray, Huerta, and the battered child syndrome cases, such as Taylor, Tanner, McGuire, and Schleret, mirrors the transaction evidence the district court rejected. These cases share common themes that the district court should have taken into account, chief among them that evidence of a child’s nonaccidental injuries and a parent or caregiver’s abuse of that child is not “character” evidence and is admissible.

III. THE EXCLUSION OF ADMISSIBLE TRANSACTION EVIDENCE RESULTS IN GROSS INJUSTICE.

When child abuse cases go undetected, the physical abuse generally escalates and often culminates in death. See, e.g., Nancy Wright and Eric Wright, SOS (Safeguard Our Survival): Understanding and Alleviating the Lethal Legacy of Survival Threatening Child Abuse, 16 Am. U.J. Gender Soc. Pol’y L. 1.

Although the act of killing a child may be a one-time event, it is not generally an act that occurs in isolation, but in series with other relevant abusive acts. The district court’s mistake in failing to recognize the unique nature of child physical abuse, culminating in the homicide of a three-month-old baby, and the court’s resulting order excluding relevant evidence, whether labeled 404(b) or transaction,

will cause a gross injustice. The order limits the State's ability to present a case against Anderson, removes factual disputes that should be resolved by a jury, and violates public policies for the protection of children.

Transaction evidence and 404(b) evidence often overlap. When the State filed a timely 404(b) notice detailing all of the evidence that it might conceivably introduce under 404(b), it recognized both the distinction between the two categories of evidence and the potential for overlap. When the court concluded the State's first notice was technically inadequate, and then that the adequate, amended notice was untimely, its order excluding all of the evidence unless it could be admitted pursuant to the transaction rule was, perhaps, overly harsh. The court could have allowed the amended notice to stand, given the lack of surprise and the State's attempts at substantial compliance to remedy the technical deficiencies objected to. (See Ex. E at 133, 144-46.)

The district court's interpretation of the transaction rule, and broad exclusion of so-called "character" evidence, prevents the State from presenting complete testimony from Dr. Kemp, thereby making it extremely difficult for him to support his opinion that V.A.C.'s death was nonaccidental and most likely resulted from suffocation. Arguably, Dr. Kemp's complete findings, including all of V.A.C.'s past fractures in various stages of healing, were neither 404(b) evidence nor

transaction evidence, but medical evidence documenting the condition of V.A.C.'s three-month-old body.

If the district court had allowed Dr. Kemp's full testimony, Dr. Kemp would have been able to give his opinion based upon his autopsy findings, that V.A.C. had been the victim of child abuse as evidenced by her numerous rib fractures in various stages of healing. Dr. Kemp could not identify who had abused V.A.C.; the State would be required to prove identity through other admissible evidence. Anderson could have challenged Dr. Kemp's opinions through her own expert, and the jury, the appropriate fact finder, would then have to resolve the disputed testimony. The only way for V.A.C.'s story to be told is through the body she left behind. As it stands, the true story of her abbreviated life will remain untold.

The district court's conclusion that Anderson did not raise mistake or accident as a defense is incorrect. Anderson suggested, in the 911 call, that her 2-year old daughter, E.A.C., was responsible. The State would have presented evidence that Anderson was V.A.C.'s primary caretaker and the person who spent the most time with her. The State further wanted to present evidence from witnesses of Anderson's harsh treatment of tiny V.A.C. As a result of the district court's ruling, the State will be unable to do so, even though this Court and courts around the country have routinely allowed such evidence.

Battered child evidence is not inadmissible character evidence. In child abuse homicides, the cause and mechanism of death is often unknown. Because the State cannot prove V.A.C.'s many rib fractures caused her death, the evidence does not meet the Just similarity requirement, as the district court found. Rather, the evidence is transactional. As the defense conceded below, the medical evidence "is what it is." (Ex. E at 159.)

CONCLUSION

Tragically, V.A.C.'s death in Gallatin County is not the first time courts in this State and nation have addressed these issues. Based on their guidance, and the correct application of the transaction rule, this Court should correct the district court's mistakes of law and allow the jury to hear the entire circumstances of the injuries and abuse suffered by V.A.C. prior to, but inseparable from, her untimely, nonaccidental death. The import of the authorities cited above undermines the district court's adopted legal conclusions that Anderson's case was a "textbook use of character evidence" and that homicide cases such as this are somehow "different" and lacking in the "special 'explanatory' need to be served by discussing prior abuse." (Ex. F at 17, 18.)

As this Court has explained, "[T]he only available link between the specific nature of the child's injury and the caretaker may be the evidence of prior abusive conduct by the caretaker." Huerta, 285 Mont. at 255-56 (citing Sigler, 210 Mont.

at 254). Such is the case here, and this Court should exercise its power of supervisory control pursuant to Mont. R. App. P. 14(3) to correct the district court's order regarding transaction evidence and, thereby, prevent the resulting gross injustice.

Respectfully submitted this ____ day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing
Petition for Writ of Supervisory Control to be mailed to:

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DATED: _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14 of the Montana Rules of Appellate Procedure, I certify that this petition for writ is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 4,000 words, excluding certificate of service and certificate of compliance.

By: _____
JONATHAN M. KRAUSS
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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY, THE HONORABLE
MIKE SALVAGNI, DISTRICT JUDGE,

Respondent.

UNREDACTED EXHIBITS FILED UNDER SEAL

The following exhibits to this Petition for Writ of Supervisory Control are
filed separately, under seal:

Affidavit of Probable Cause and Motion for Leave to File Information (D.C. Doc. 1)	Exhibit A
Information (D.C. Doc. 3)	Exhibit B
Report of Post Mortem Examination (Def. Ex. 2 to D.C. Doc. 121) ..	Exhibit C
<u>Just</u> Notice (D.C. Doc. 46)	Exhibit D
Excerpt of Transcript of March 11, 2010 Hearing (3/11/10 Tr. at 1-5, 131-186)	Exhibit E
Decision and Order Re: Defendant's Motion to Strike Amended <u>Just</u> Notice and Objections to State's <u>Just</u> Notice (D.C. Doc. 230)	Exhibit F
Defendant's Reply Brief Objecting to State's <u>Just</u> Notice (D.C. Doc. 176)	Exhibit G